LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 17 1971
E. ROBERT SEAVER, CLERK

In the

Supreme Court Of The United States

OCTOBER TERM, 1971

No. 71-757

T. R. GRUBBS, D/B/A T. R. GRUBBS TIRE & APPLIANCE,
Petitioner,

v.

GENERAL ELECTRIC CREDIT CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUBERT D. JOHNSON
ROBERT N. RULE, JR.
Of Johnson, McElroy, Cravens
& Boone
1900 Mercantile Dallas
Building
Dallas, Texas 75201 748-7281
Attorneys for Respondent.

INDEX

	Page
Questions Presented	1
Statutes Involved	2
Argument	2
Conclusion	8

List of Authorities

American Dredging Co. v. Local 25, Marine Div. Int. U. Op. Eng., 338 F. 2d 837 (3rd Circ., 1964)	7
Hoyt v. Sears, Roebuck & Co., 130 F. 2d 636, *cert. denied* 63 S. Ct. 257, 317 U. S. 687, 87 L. Ed. 550	7
Shamrock Oil & Gas Corporation v. Sheets, 61 S. Ct. 868, 313 U. S. 100, 85 L. Ed. 550	7
15 U.S.C.A. §15	5
28 U.S.C.A. §1331	5
28 U.S.C.A. §1332	5, 6
28 U.S.C.A. §1345	7
28 U.S.C.A. §1441	5, 6
28 U.S.C.A. §1444	2, 3, 4
28 U.S.C.A. §1447	8
28 U.S.C.A. §2410	2, 3, 4

In the

Supreme Court Of The United States

OCTOBER TERM, 1971

No. 71-257

T. R. GRUBBS, D/B/A T. R. GRUBBS TIRE & APPLIANCE,
Petitioner,

v.

GENERAL ELECTRIC CREDIT CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that this case was improperly removed by the United States of America.

2. Whether the Court of Appeals was correct in holding that there are no other grounds upon which this case could have been removed.

STATUTES INVOLVED

28 U.S.C.A. §1441
28 U.S.C.A. §1444
28 U.S.C.A. §2410

ARGUMENT

1. The United States of America was joined as a party Defendant in this action by Petitioner for interpleader purposes comparable to interpleader under Rule 22 of the Federal Rules of Civil Procedure. The Petitioner attempted to establish an interpleader action involving the United States of America by alleging that he was in jeopardy because of adverse claims being pressed by the United States of America and eight other lien claimants, and by praying that the priority of the lien claimed by the United States be determined in a manner comparable to the provisions of Rule 22. The United States of America removed the case from the state court to a federal court on the basis of 28 U.S.C.A. §1444 and 28 U.S.C.A. §2410(a). 28 U.S.C.A. §1444 provides:

> Any action brought under section 2410 of this title against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending.

28 U.S.C.A. §2410(a) provides:

> (a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be

named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to, real or personal property on which the United States has or claims a mortgage or other lien.

On appeal the Fifth Circuit Court of Appeals found that there was a complete absence of federal jurisdiction and concluded that the Petitioner had failed to file a viable interpleader action against the United States of America. Therefore, it was concluded that the case had been improperly removed under 28 U.S.C.A. §2410(a) and 28 U.S.C.A. §1444. It is clear that the Petitioner failed to demonstrate that he had been or might be subjected to adverse claims, either because he was exposed to multiple liability on one obligation due to inconsistent claims or because as a stakeholder with limited liability he was being subjected to claims which exceed in the aggregate the liability limit. The pleading showed that claims being asserted against the Petitioner are those of nine judgment holders including the United States of America. Petitioner did not deny the validity of any of the nine judgments nor did he deny that he was individually liable to each of the judgment holders. Petitioner was not, therefore, only

singly liable and entitled to claim the benefits of interpleader as under Rule 22 to avoid multiple liability. Nor was the Petitioner in the position of a stakeholder with limited liability. If Petitioner was liable at all, which he did not deny, he had unlimited liability as a principal debtor on each of the obligations for which judgments had been taken. The fact that he may have a limited ability to pay does not in any way affect the availability of the interpleader procedures.

Since the relief sought by Petitioner against the United States of America was sought wholly under the interpleader theory, the Petitioner's action against the United States of America should have been dismissed at the outset when he failed to plead a cause of action on a good faith interpleader theory. The removal by the United States of America was improper since no viable interpleader action was instituted against it that would justify removal under the provisions of 28 U.S.C.A. §2410(a)(5). As this suit was not within any of the other provisions of 28 U.S.C.A. §2410(a), the Court of Appeals was correct in remanding this suit to the federal district court with instructions that it be remanded to the state court from which it was removed.

2. The Court of Appeals based its decision entirely upon its findings that "the sole grounds alleged for federal jurisdiction in the instant case rests on the Government right to remove under Section 1444, since it was named a defendant in Grubbs' interpleader suit."

The Court of Appeals further stated that "there never has been any allegation of diversity of citizenship between the parties to this suit, nor is there any basis for federal question jurisdiction." In reply to the request of the Court of Appeals for supplemental briefs from all parties directed to the question of whether the district court properly assumed jurisdiction in this case and whether the case could have been removed under any other federal statute, Petitioner asserted for the first time that the district court had jurisdiction under 28 U.S.C.A. §1332 (diversity of citizenship), 15 U.S.C.A. §15 (suits under the United States anti-trust laws), 28 U.S.C.A. §1331 (suits involving federal questions), and 28 U.S.C.A. §1441 (the general removal statute). Petitioner continues to assert the applicability of each of these sections in his Petition for Rehearing and his Petition for Writ of Certiorari.

Admittedly, Petitioner and Respondent are citizens of different states. Petitioner is a citizen of the State of Texas, whereas Respondent is a New York corporation. Removal by the non-resident based on diversity of citizenship is expressly provided for in 28 U.S.C.A. §1441, which provides as follows:

> Sec. 1441 Actions generally removable.
>
> . . .
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the

parties. *Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.* (Emphasis added.)

In the instant case the removal was not within the provisions of Section 1441. Petitioner, the defendant below, is a citizen of Texas, the State in which the Respondent brought its action. Respondent, the New York resident, did not seek the removal. Reference in the Petition for Certiorari to 28 U.S.C.A. §1332 is wholly irrelevant since Section 1332 relates to original jurisdiction of the United States District Courts and has no application to removal from state courts to federal courts.

The only possible ground for removal based on federal question jurisdiction is the allegation of Petitioner's Cross Action wherein he charged that Respondent and General Electric Company had committed acts in violation of the anti-trust laws of the United States. Under proper conditions such allegations might have provided a basis of original jurisdiction in a federal court action but they cannot be the basis for removal. Here Petitioner urged such claims in his cross-action in the state court. Obviously, a defendant-cross plaintiff cannot remove to a federal court on the basis of allegations contained in his cross action, since as to such cross action he is a plaintiff. It is also well established that a plaintiff cannot remove a suit to a federal court based on the allegations contained in a defendant's

cross action, whether the grounds for such removal be diversity of citizenship or the presence of a federal question. *See, e.g., Shamrock Oil & Gas Corporation v. Sheets*, 61 S. Ct. 868, 313 U. S. 100, 85 L. Ed. 1214, and *Hoyt v. Sears, Roebuck & Co.*, 130 F. 2d 636, *cert. denied* 63 S. Ct. 257, 317 U. S. 687, 87 L. Ed. 550.

After the case was removed to the federal court on the petition for removal of the United States of America, the United States of America filed a pleading in which it charged Respondent and General Electric Company with wrongfully and maliciously interfering with the Petitioner's performance of his contractual relationships with the United States of America. This type of damage claim asserted by the United States of America would have been within the original jurisdiction of a federal district court under 28 U.S.C.A. §1345. However, federal jurisdiction in removal cases must be tested as of the time that the removal from the state court to the federal court took place. Consequently, the filing of pleadings in the federal court subsequent to the removal of an action cannot be given consideration from the standpoint of whether the federal district court had jurisdiction in this matter. In *American Dredging Co. v. Local 25, Marine Div. Int. U. Op. Eng.*, 338 F. 2d 837 (3rd Cir., 1964) the court discussed this question at length. The *American Dredging Co.* case and many like it stand for the sound proposition that removal jurisdiction must be viewed from the standpoint of the pleadings in the state court when

the removal is attempted. The subsequent pleading by the United States of America filed by it for the first time in the federal court cannot be given consideration in deciding the question of whether the prior removal was proper or improper.

Respondent respectfully submits that there were no grounds upon which this suit could have been properly removed. Therefore the Court of Appeals in accordance with the provisions of 28 U.S.C.A. §1447, was correct in remanding this action to the United States District Court with instructions that the case be remanded to the state court for appropriate disposition.

CONCLUSION

The Writ of Certiorari on the points presented by Petitioner should be denied.

Respectfully submitted,

HUBERT D. JOHNSON
ROBERT N. RULE, JR.
Of Johnson, McElroy, Cravens
& Boone
1900 Mercantile Dallas
Building
Dallas, Texas 75201 748-7281
Attorneys for Respondent.

A copy of this Brief is being mailed to Mr. J. R. Cornelius, 123 North Polk Street, Jefferson, Texas 75657, attorney for Petitioner, on September 15, 1971.

Hubert D. Johnson